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No. 82-80

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CHARLES KING - - - - - - - Petitioner

vs.

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for Writ of Certiorari
To the Court of Appeals of Kentucky

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I.

Whether Petitioner Was Denied the Right to Confront the Witnesses Against Him When the Court Admitted Into Evidence a Tape Recording Made by Petitioner Contemporaneous with the Crime Which Contained Remarks of Petitioner's Partners in Crime as Well as Those of Petitioner Where Petitioner's Partners in Crime Did Not Testify at the Trial?

II.

Whether the Application of Ky. Rev. Stat. §510.145 in This Case Denied Petitioner His Right to Confront the Witnesses Against Him?

III.

Whether the Court of Appeals of Kentucky Erred In Ruling That It Was Not Necessary to Give the Corroboration Instruction Requested by Petitioner?

IV.

Whether the Other Alleged Errors Raised by Petitioner Rendered His Trial so Fundamentally Unfair as to Deny Him Due Process of Law?

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CHARLES KING - - - - - *Petitioner*

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COMMONWEALTH OF KENTUCKY - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

May it please the Court:

The respondent, Commonwealth of Kentucky, prays that the petition for writ of certiorari to review the opinion of the Court of Appeals of Kentucky rendered December 23, 1981 be denied.

OPINION BELOW

The Opinion of the Kentucky Court of Appeals, the order denying the petition for rehearing, and the order of the Kentucky Supreme Court denying discretionary review are set out in the appendix to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are set out in the petition.

STATUTORY PROVISIONS INVOLVED

In addition to those set out in the petition, the case involves Kentucky Rule of Criminal Procedure (RCr) 9.72, which at the time of the trial read:

> JURY TO TAKE EXHIBITS
>
> Upon retiring for deliberation, the jury may take all papers and other things which have been received as evidence in the case.

STATEMENT OF THE CASE

Petitioner was indicted in Fayette Circuit Court in August of 1980. Count one of the three count indictment charged that he, Buck Johnson and Gary Blevins committed rape contrary to Ky. Rev. Stat. § 510.040 by making Penny Sue Blevins engage in sex with Anthony Rucker by forcible compulsion. Count two charged that King, Gary Blevins and Buck Johnson made Penny Sue Blevins engage in sex with Johnson by forcible compulsion. A third count charged King with second degree promoting prostitution (Transcript of the Record, hereinafter "T.R.", 2-3). King's guilt on the rape charges was to be proven under Ky. Rev. Stat. § 502.020(1)(b) which permits one who aids or counsels one who commits an offense to be found guilty of the crime (T.R. 14).

In support of the promoting prostitution charge the Commonwealth produced several witnesses.

Kim Christianson, a sixteen year old girl, testified the Sue Blevins, the girl later raped, had sex with a man named Gene Ross for thirty dollars. After the sex he laid three ten dollar bills on the table of which Kim got ten dollars and King got twenty dollars. The event took place in an apartment beside a laundromat, both of which are owned by petitioner (Transcript of Evidence, Trial Volume I, hereinafter "T.E. I", 81). King was not present during the incident (T.E. I, 80), but after Ross and Blevins came out of the bedroom King asked Ross, ". . . was that the best piece he's had in a long time . . ." (T.E. I, 81). At some time King had asked Kim if she wanted to "pimp" Sue "off" (T.E. I, 82). King told Kim that she was to charge thirty dollars for the sex. The proceeds would be divided three ways (T.E. I, 85). Kim testified that she was afraid of King (T.E. I, 96).

Herbert Gene Ross admitted paying thirty dollars for sex with Sue Blevins. He said the event took place in February 1980 at the apartment owned by petitioner (T.E. I, 98). Kim Christianson asked him if he wanted to buy sex. She said the price was thirty dollars. Ross left three ten dollars bills on the table (T.E. I, 101). He recalled that King made a statement similar to the one attributed to King by Kim.

Petitioner also thought "maybe" he might have made that statement (T.E. III, 416).

Penny Sue Blevins, also sixteen at the time of the crimes, testified that the incident with Ross took place

on the Tuesday before the rape (T.E. II, 204). On Monday Kim and King approached her about becoming a prostitute. Kim was to be the pimp (T.E. II, 201-203). From the thirty dollars paid by Ross, King took ten dollars, Kim got ten dollars and King put Sue's ten dollars in a book (T.E. II, 204). Sue also testified that King told her she would have to leave the apartment petitioner provided Sue and her husband if she did not become a prostitute (T.E. II, 229).

The rape occurred in the following way.

On the Saturday following the Ross incident, Sue told King's daughter about her arrangement with King. King's daughter called petitioner's wife and had Sue tell her as well (T.E. II, 205-206).

King's wife came to the laundromat, slapped King, Sue, and Sue's husband, Gary (T.E. II, 206). King's wife also testified that after being slapped, Sue told her that Sue had been to bed with King (T.E. III, 311, 313). Mrs. King took her rings, threw them at King, told him she wanted a divorce and left (T.E. III, 315).

That evening, Sue Blevins fought with Kim and King pulled Sue out of harm's way (T.E. II, 207). At some time during the evening King hit Sue's hand and injured her thumb (T.E. II, 228-229).

Later that night petitioner made a tape recording of a conversation during which he attempted to get Sue to admit that she had lied to Mrs. King. At the trial King acknowledged that Sue did not say she had lied to Mrs. King (T.E. III, 406-407). Petitioner admitted making this part of the tape (T.E. III, 378).

On the tape King repeatedly threatened Sue. He said that he would have Kim Christianson and other girls beat Sue, perhaps to death (Tape, T.E. II, 211-212). He also said, "And you don't know what I've got in store for you (unintelligible). You ain't seen nothing yet. I've got some things you don't even know about got's to happen to you that you're going to be sorry for" (Tape, T.E. II, 213).

The victim testified that while King was threatening her, Gary Blevins, Stevie King (petitioner's son), and Buck Johnson came into the room (T.E. II, 218). The tape details how petitioner, Gary Blevins and the others forced her to have sex with Johnson. The rape occurred in the apartment used for the prostitution. That apartment is in the same building where Sue Blevins lived (T.E. II, 200, 202).

On the tape recording petitioner is heard to say: "Sue—Sue, don't play the nice girl on me, tramp, you better get your ass over there with him [Johnson] . . ." A moment later King said: "Sue, if you don't get over there, you know, we'll figure out a way . . ." (Tape, T.E. II, 220).

Petitioner has never disputed the accuracy of any part of the tape recording.

The victim testified that she had sex with Johnson because she was afraid of the men who were threatening her. Earlier, Blevins had whipped her with a belt and had blacked her eye. On the night of the rape Blevins was brandishing a nightstick and she feared he would strike her again if she did not submit (T.E. II, 224-225). King had injured her thumb that night

(T.E. II, 228). She said she was afraid of King (T.E. II, 279).

The victim's testimony was supported by other witnesses. Letha Pash, the victim's sister by adoption, testified that around 2:30 or 3:00 a.m. she heard Sue screaming. The next morning Sue had a swollen thumb and appeared to have been crying (T.E. I, 109-111).

Laura Clouse, Sue's sister-in-law, saw Sue the next morning. She said Sue appeared to have been crying. Sue told her she was afraid to go back to her own apartment (T.E. I, 124-125). Although Sue did not say she had been raped, she did say she had been kicked and that her thumb had been broken. Sue also said she had not been permitted to eat anything on the night of the rape. During the time Mrs. Clouse was with the victim, Sue cried repeatedly (T.E. II, 129-130).

George Clouse, Sue's brother by adoption, said that Sue appeared to have been beaten and kept crying. He said, "you couldn't make heads nor tails out of what she was saying and just crying and really tore up" (T.E. I, 134).

King testified that he was innocent of any involvement in Sue's prostitution activity (T.E. III, 365-367). As to the rape, he testified that he did not make the part of the tape which dealt with the rape (T.E. III, 391). He encouraged Sue to make advances to Johnson but used no force (T.E. III, 394). After the tape was played during his cross-examination, he said that during the making of the tape Sue was enjoying what was happening (T.E. III, 429).

Petitioner was convicted of rape as to the count involving Buck Johnson. He was also convicted of second degree promoting prostitution. In accord with the jury's verdict, on October 18, 1980, he was sentenced to fourteen years on the rape charge and one year on the promoting prostitution charge. The sentences were ordered to be served consecutively (T.R. 67-70).

Petitioner's conviction was affirmed by the Kentucky Court of Appeals in an unpublished opinion. The Kentucky Supreme Court denied discretionary review. This petition followed. Respondent will set out additional facts relating to each of petitioner's contentions in the section of its brief which details the reasons for denying the petition.

REASONS FOR DENYING THE WRIT

I.

The Ruling of the Trial Court That Taped Statements of Petitioner and His Partners In Crime Made During the Crime Were Admissible Was in Accord with Rulings of this Court.

The tape in question was made by petitioner himself (T.E. II, 218). The tape was made contemporaneous to the crime. It recorded the voice of petitioner and those he aided and encouraged in forcing the victim to have sex. Admission of the unedited tape into evidence did not deny petitioner his right under the Sixth Amendment of the United States Constitution to confront the witnesses against him.

The tape was properly admitted under the well established rule which permits the introduction of acts, appearances and declarations of joint participants in a criminal venture against each participant for the purpose of presenting the situation at the time of the crime. It is not necessary that the participants be charged as conspirators. *St. Clair* v. *United States*, 154 U. S. 134 (1894). The statements were made in petitioner's presence during the joint commission of the crime. They were part of the *res gestae* surrounding the crime and were admissible regardless of whether Gary Blevins and the others testified at the trial. *States* v. *Chee*, 422 F. 2d 52 (9th Cir. 1970).

Out of court statements constitute hearsay only when offered to prove the truth of the matter asserted. *Anderson* v. *United States*, 417 U. S. 211, 219 (1974). In this case the statements were competent to allow the jury to infer petitioner's state of mind without regard to the truth of the statements, therefore the hearsay rule is clearly inapplicable. *United States* v. *Rivers*, 468 F. 2d 1355 (4th Cir. 1972), cert. denied 411 U. S. 969 (1973). The statements were not offered as assertions but as utterances contemporaneous with the force applied on the victim, related to it and which threw some light upon it. Admission of these non-hearsay statements made by persons who did not testify did not violate petitioner's right to confront the witnesses against him. *United States* v. *Jackson*, 588 F. 2d 1046 (5th Cir.), cert. denied 442 U. S. 941 (1979).

Even if the statements could be categorized as hearsay they were admissible under the rule which

allows the out-of-court statements of any conspirator to be admitted into evidence against fellow conspirators. This Court has stated the reason for the rule as follows:

> The rationale for both the hearsay conspiracy exception and its limitations is the notion that conspirators are partners in crime . . . As such, the law deems them agents of one another. . . .
>
> *Anderson, supra,* 218 n. 6 (citations omitted).

Although the rule is most often applied in conspiracy cases it is clear that it is equally applicable to any case in which one partner in crime makes a statement which is introduced against his accomplice. For example, in *Dutton* v. *Evans,* 400 U. S. 74 (1970), the prosecution was for the substantive offense of murder rather than conspiracy. See *Dutton, Id.,* 83 n. 14.

Dutton concerned the question of whether the admission into evidence against Evans of a statement by an accomplice who did not testify violated the right of Evans to confront the witnesses against him. The court noted that the statement contained no assertion about a past fact, that the declarant had personal knowledge of the matter about which he spoke, that there was virtually no chance that the statement was founded on faulty recollection and that the statement was spontaneous, therefore the statement carried sufficient indicia of reliability to allow its admission. *Dutton, Id.,* 88-89. The court also stated:

> The decisions of this Court make it clear that the mission of the Confrontation Clause is to ad-

> vance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' California v. Green, 399 U. S., at 161, 90 S. Ct., at 1936. . . .
>
> *Dutton, Id.,* 89.

Like the statements in *Dutton,* the tape recording bore sufficient indicia of reliability to warrant its being placed before the jury. The tape was made by King himself at the time of the rape. The accuracy of the tape is unquestioned. It records the spontaneous utterances of the participants in the rape. Petitioner, while not able to cross-examine his accomplices, was able to cross-examine the victim about the circumstances surrounding the statements and what she understood the remarks to mean. There was no denial of King's right to confront the witnesses against him.

Petitioner also complains that the Commonwealth should be required to show that Gary Blevins and the others were unavailable. Blevins had informed the prosecutor if called to testify he would invoke his right under the Fifth Amendment not to incriminate himself (T.E. I, 4). It would have been reversible error for the prosecution to call him to the witness stand. *Commonwealth* v. *Brown,* 619 S. W. 2d 699 (Ky., 1981). Blevins was most certainly unavailable. In any event in cases like the one at bar involving statements by accomplices, the utility of trial confrontation is remote and there is no requirement that the declarant be un-

available. See *Dutton, supra,* and *Ohio* v. *Roberts,* 448 U.S. 56, 65, n. 7 (1980).

Finally, petitioner argues that the harmless error rule enunciated by this Court in *Chapman* v. *California,* 386 U. S. 18 (1967), and *Harrington* v. *California,* 395 U. S. 250 (1969), does not apply to the case at bar. This contention was not raised by petitioner in any of the courts below and thus should not be considered by this Court. *Sonzinsky* v. *United States,* 300 U. S. 506 (1937).

Nor is petitioner correct in assuming that the rule is not applicable. The fact that the alleged error involves the right of an accused to confront the witnesses against him does not automatically render the rule inapplicable. *Harrington* itself involved an alleged violation of the Confrontation Clause.

In *Brookhart* v. *Janis,* 384 U. S. 1 (1966), upon which petitioner relies for his assertion that denial of effective cross-examination may never be harmless, the issue was one of waiver. This Court was merely quoting the respondent's brief when it stated:

> . . . '[I]f there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'
>
> *Brookhart, Id.* 3.

Although this Court in *Davis* v. *Alaska,* 415 U. S. 318 (1974), quoted the above language in its opinion, it was not necessary for the Court in *Davis* to modify the *Harrington* rule and establish a *per se* rule to

achieve the result obtained. The defense in *Davis* was denied the opportunity to question a crucial witness who had a criminal record about his relationship with the authorities. Clearly the right to effectively cross-examine such a witness may never be harmless error, however it does not follow that any denial of the right to cross-examine a witness may never be harmless without regard to what cross-examination is denied and regardless of the facts in the case. See *United States* v. *Price,* 577 F. 2d 1356 (9th Cir. 1978), cert. denied, 439 U. S. 1068 (1979).

In this case there was overwhelming evidence against petitioner aside from the statements of his partners in the venture. There were his own statements on the tape which were utterly devastating to his defense. His trial testimony consisted of the lame explanation that notwithstanding the tape, the victim enjoyed herself. Sue Blevins testified and was extensively cross-examined. Her testimony was corroborated by other witnesses who testified to her hysteria and battered condition on the morning following the rape. The error, if any, in admitting the unedited tape was harmless beyond a reasonable doubt.

II.

The Application of Kentucky's Rape Shield Law Did Not Deny Petitioner His Right Under the Sixth Amendment of the United States Constitution to Confront the Witness Against Him.

The Court of Appeals of Kentucky in the instant case ruled that Ky. Rev. Stat. § 510.145, the rape shield

law, did not violate either the Kentucky or the United States Constitution. Its holding was based upon *Smith* v. *Commonwealth,* 566 S. W. 2d 181 (Ky. App. 1978), wherein the Court stated:

> Is KRS 510.145 constitutional? This question apparently has not be answered in this jurisdiction. We believe the statute is constitutional and is a valid exercise by the legislature of this Commonwealth to prevent the victim in a sexually related crime from becoming the defendant at a trial. . . .
>
> *Smith, Id.,* 183.

The Court in Smith went on to say that the legislature correctly concluded that juries placed to much emphasis on evidence of the victim's prior sexual conduct and that . . . "evidence of prior sexual conduct has little probative value, at best" *Smith, Id.,* at 183. See also *Bell* v. *Harrison,* 670 F. 2d 656 (6th Cir. 1982), which held that Tennessee's rape shield law did not deny an accused the right to confront the witnesses against him. The Court stated the rationale for the rape shield laws as follows:

> The rationale behind these statutes is that evidence of a rape victim's prior sexual activity is of dubious probative value and relevance and is highly embarrassing and prejudicial. Often such evidence has been used to harass the prosecuting victim. Sponsors of these statutes assert that they encourage victims of sexual assault to report the crimes without fear of having their past sexual history exposed to the public.
>
> *Bell, Id.,* 658.

Evidence of the victim's prior sexual conduct with those other than petitioner was not relevant to the issue of consent. *United States* v. *Nez,* 661 F. 2d 1203 (10th Cir. 1981). Nor does the prior sexual conduct of the victim have any relevance to her credibility as a witness. *United States* v. *Kasto,* 584 F. 2d 268, 272 n. 3 (8th Cir. 1978), cert. denied 440 U. S. 930 (1979). The evidence was properly excluded under the statute.

In addition to the above reasons, the evidence was properly excluded because it was irrelevant to petitioner's theory of the case. This Court has stated that in the exercise of his right to present evidence and to confront the witnesses against him " . . . the accused as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers* v. *Mississippi,* 410 U. S. 284, 302 (1973). The testimony taken by avowal showed that although Sue's mother and aunt took Sue to bars it was not the mother's purpose to attract men. Sue's mother was not a prostitute and Sue did not have sex with the men her mother met (T.E. II, 292-293). Certainly, the conduct of Sue's mother and aunt had no bearing on whether Sue sought to destroy petitioner or on Sue's credibility. Sue said the encounters with her stepfather and brother-in-law were against her will (T.E. II, 295). Far from showing that she was a "sexual manipulator" the evidence showed that she was victimized by family members.

The evidence did not support an inference that she fabricated the charge to "hurt" petitioner. The vic-

tim did not report the rape or petitioner's involvement in it. She merely told her relatives that she had been beaten (T.E. I, 129). King told Gary Blevins to release the tape to Mrs. Clouse and she gave the tape to the police (T.E. II, 123-124, 126). It was King's own action that caused the charge to be brought.

The Sixth Amendment requires only that the accused be permitted to introduce all relevant and admissible evidence. The evidence of the victim's prior sexual activity which petitioner sought to introduce would have served no purpose beyond needlessly humiliating the victim and was properly excluded. *Smith* and *Kasto, supra.*

Finally, petitioner cross-examined the victim at length. During the course of the cross-examination he asked the victim about a statement she allegedly made about wanting to become a prostitute. He also brought to the jury's attention that when someone hurt the victim she liked to get even with them (T.E. II, 245-246). In addition, Sue was fully cross-examined about her part in the prostitution involving Gene Ross.

The scope of cross-examination is within the trial court's sound discretion. The right to cross-examine is not *carte blanche* and limitations on cross-examination give rise to reversible error only when the limitations deny the examiner the opportunity to effectively cross-examine in violation of the rights secured by the Sixth Amendment. *United States* v. *Haro,* 573 F. 2d 661 (9th Cir.), cert. denied 440 U. S. 930 (1978). The evidence against King was overwhelming. If the court erred in imposing the minor limitation on the cross-

examination of the victim about which petitioner complains, the restriction did not deny him the right to effectively cross-examine her and the error was harmless beyond a reasonable doubt. See *Price* and *Haro, supra.*

III.

The Court of Appeals of Kentucky Correctly Ruled That It Was Not Necessary to Give the Corroboration Instruction Requested by Petitioner.

Petitioner states that the trial court's refusal to give a requested corroboration instruction under RCr 9.62 violated the *ex post facto* clause of the United States Constitution, U. S. Const., Art. I, § 10 Cl. 1. It is true that the Kentucky Supreme Court in *Commonwealth* v. *Brown, supra,* held that the accomplice instruction was required in cases in which the crime occurred while RCr 9.62 was in effect. Although the Commonwealth in its brief, which was filed before *Brown* was decided, argued that there was no *ex post facto* violation, the Commonwealth argued in the alternative that the instruction was unnecessary even if RCr 9.62 was applicable in the case. In addition, the *Brown* decision was cited to the Court of Appeals at oral argument and was cited to the Kentucky Supreme Court in both the motion for discretionary review and the response to the motion. (See motion, p. 26, and response, p. 19.)

The decision of the Court of Appeals was not based upon any misinterpretation of the *ex post facto* clause nor did the court ignore the holding in *Brown.* The

court merely found that failure to give the instruction was harmless error. The case upon which the court relied was *Mishler* v. *Commonwealth,* 556 S. W. 2d 676 (Ky. 1977). In *Mishler* the court held that where there is sufficient evidence to support a conviction without the testimony of the accomplice, the instruction ordinarily required by RCr 9.62 need not be given.

In this case the testimony of the accomplice, Kim, was merely cumulative to the testimony of Sue Blevins. Sue's testimony was sufficient to convict petitioner. The jury was instructed that Sue's testimony must be corroborated by other evidence in order to convict King (T.R. 49). The corroboration was supplied by Gene Ross as to how payment was made and as to King's remark about whether Sue was the "best piece of pussy" Ross ever had had (T.E. I, 101-102).

Failure to give the instruction was not reversible error. *United States* v. *Shuckahosee,* 609 F. 2d 1351 (10th Cir. 1979), cert. denied, 445 U. S. 919 (1980); and *United States* v. *Wright,* 573 F. 2d 681 (1st Cir.), cert. denied 436 U. S. 949 (1978). It should also be noted that the error, if any, only affected petitioner's conviction for promoting prostitution since Kim's testimony did not concern the rape charge.

IV.

The Petitioner Was Not Denied Due Process of Law.

In the final section of his petition, petitioner raises a number of alleged errors which he argues denied him his right to a fair trial under the Fourteenth Amend-

ment of the United States Constitution. As respondent has noted in the previous section, the Kentucky courts did not ignore either decisions of this Court or their own decisions with regard to the accomplice instruction. In addition it is clear that petitioner received a fair trial.

The tape of the events which immediately preceded the sex was played four times. It was played so that the detective who took King's statement could identify the tape as the one played for King to refresh King's recollection of the events of the night of the crime (T.E. II, 181). The tape was relevant to explain the abrupt change in King's manner and responses to police questions. The victim identified the voices on the tape and explained what was occurring while the recording was made (T.E., 208-214). Petitioner was confronted with the tape on cross-examination to give him an opportunity to explain or deny the accuracy of the tape (T.E. IV, 427). There was no objection when the tape was played during the prosecutor's final argument (T.E. IV, 487). The tape served a legitimate purpose each time it was played and the court did not abuse its discretion in allowing the tape to be replayed. *United States* v. *Williams,* 548 F. 2d 228 (8th Cir. 1977). In addition, the replaying did not prejudice petitioner's rights inasmuch as RCr 9.72 allows the jury to have all papers and other things which have been admitted into evidence during its deliberations. Petitioner was told in advance that the jury would take the tape to the jury room when it retired but did not

raise an objection until the next day (T.E. IV, 478, 485).

Petitioner was not denied a fair trial when the court played a tape of King's conversation with police officers in which petitioner attempted to exculpate himself. Petitioner's statements on the tape did not concern Sue's past conduct. Petitioner stated that Sue said her mother and aunt were prostitutes (T.E. II, 150). On the tape petitioner also said Sue told him she wanted to be a prostitute (TE II, 153). Petitioner was allowed to cross-examine her about that alleged statement. In addition, on the tape petitioner made it clear that he did not approve of such conduct (TE II, 153).

There was no error in the prosecutor's statements concerning the victim's mental ability. The prosecutor stated, "It's also going to be apparent from her testimony that Sue Blevins has some mental retardation" (T.E. I, 25). The statement was merely a comment on what the evidence would show. The jury could observe the victim's demeanor and draw its own conclusion. In addition the evidence showed that Sue had only completed grade school and did poorly (T.E. I, 130-131). This supported the Commonwealth's contention that she had some degree of impairment. It is also obvious to anyone who reads the transcript in this case that she was often unable to understand questions which were asked of her and that the questions often had to be repeated or rephrased.

Finally, the trial court did not violate its own order. The court referred to the agreement between

King and the Commonwealth and stated that " . . . it is agreed that Charlie King's accountability, if any, is solely founded on the theory of aiding as defined in KRS 502.020(1)(b)" (T.R., 14). In its response to King's discovery motion the Commonwealth told King that it intended to show that King and Blevins threatened the use of force upon Sue Blevins. King was also specifically informed that the Commonwealth intended to rely upon Gary Blevins's conduct in brandishing a nightstick as part of the proof of forcible compulsion (T.R., 17). The instructions were in accord with the agreement and the trial court's order (T.R., 45).

CONCLUSION

The case at bar presents no new or novel issues. Petitioner received a fair trial. His conviction and the affirmance of that conviction were proper. The petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Stephen L. Frank, one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24 day of September, 1982, I served the petitioner with Respondent's Brief in Opposition to Petition for Writ of Certiorari by placing three copies of the same in the United States mail, first class postage prepaid, and addressed to Hon. Robert Leslie Rosenbaum, Rosenbaum & Rosenbaum, Suite 200, The Lexington Building, 201 West Short Street, Lexington, Kentucky 40507, Counsel for Petitioner.

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